



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Steven W. Winter, ) No. 97-1484-PHX-PGR  
Plaintiff, ) ORDER  
vs. )  
United States of America, )  
Defendant. )

This is a Federal Tort Claims Act matter, which was recently reversed and remanded by the Ninth Circuit. Pending before this Court is defendant's second Motion for Summary Judgment (Doc. 68)<sup>1</sup>.

**FACTUAL HISTORY**

In May, 1983, Steven Winter (plaintiff), a paraplegic, agreed to participate in an experimental program conducted by the Veteran's Administration Medical Center (VA) in Cleveland, Ohio. The program required the implantation of electrodes into the legs of paraplegics in an attempt to restore their ability to walk.

<sup>1</sup> Although this matter was set for oral argument, the Court concludes that the decisional process would not be significantly aided by oral argument because the facts and the legal arguments have been adequately presented in the parties' memoranda and statement of facts.

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1 This program was directed by Dr. E.B. Marsolias. The electrodes  
2 were implanted in plaintiff's legs between 1983 and 1986.

3 In 1989, plaintiff was hospitalized in San Clemente,  
4 California, with cellulitis, an infection in his left leg. The  
5 San Clemente doctors were informed by plaintiff of his  
6 participation in the electrode project, and suggested the  
7 cellulitis might be connected to the implants. One of the San  
8 Clemente doctors, Dr. Kadakia, contacted Dr. Marsolais. Dr.  
9 Marsolais explained that only two of his subjects previously  
10 experienced cellulitis, and neither case was related to the  
11 implantation of the electrodes. Dr. Marsolais also stated that  
12 the electrodes could remain implanted for as long as twenty  
13 years. Plaintiff was informed of this conversation and no effort  
14 was made to remove the electrodes at that time. In 1994,  
15 plaintiff's infections became more severe. Since that time, he  
16 has undergone approximately twenty-five surgeries to remove the  
17 electrodes.

#### 18 PROCEDURAL HISTORY

19 Plaintiff filed an administrative claim with the VA in July  
20 1994, alleging that his injuries resulted from the VA's negligent  
21 operation of the electrode program. The VA initially denied the  
22 claim on May 23, 1995. Pursuant to a request for  
23 reconsideration, the VA again denied plaintiff's claim in a  
24 letter allegedly mailed on January 31, 1996. Plaintiff claims he  
25 never received this letter<sup>2</sup>. On January 17, 1997, the VA, in

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27 <sup>2</sup> The Court notes that plaintiff moved and apparently failed to provide  
28 the VA with notice of his new address. Thus, he claims he did not receive  
notice that his claim was denied, but once he determined the claim was denied he  
timely filed his Complaint in federal court. Defendant, on the other hand,

1 response to plaintiff's inquiries, sent him a letter informing  
2 him that his claim had been denied a year earlier.

3 Plaintiff filed this Federal Tort Claims Act matter on July  
4 15, 1997. Subsequently, on August 29, 1997, plaintiff filed an  
5 Amended Complaint.

6 On June 1, 1998, defendant filed a Motion for Summary  
7 Judgment. The Motion argued: (1) plaintiff's claim accrued in  
8 May of 1986 or at the very latest in January of 1989, and  
9 therefore, this lawsuit is barred by the applicable statute of  
10 limitations, 28 U.S.C. § 2401(b); (2) plaintiff failed to follow  
11 the proper procedures for submitting a request for  
12 reconsideration, and therefore, his lawsuit is untimely; and (3)  
13 plaintiff failed to timely file his lawsuit in federal court, and  
14 therefore the court lacked subject matter jurisdiction.

15 On March 18, 1999, this Court concluded that plaintiff's  
16 administrative claim was timely asserted because he reasonably  
17 relied on a VA doctor who opined that his infection was not  
18 related to the implantation of electrodes.

19 This Court granted defendant's Motion for Summary Judgment  
20 with respect to plaintiff's untimely request for reconsideration.  
21 This Court reasoned that because plaintiff mailed his request for  
22 reconsideration to the VA's Regional Counsel, rather than to the  
23 General Counsel, plaintiff's request for reconsideration was not  
24 properly filed. Moreover, because this Court considered the  
25 untimely request for reconsideration to be jurisdictional, it did

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28 contends that plaintiff is responsible for notifying the VA of his changed  
address and that the statute of limitations should bar his FTCA claims.

1 not reach the issue of the timeliness of plaintiff's Complaint.  
2 Plaintiff appealed.

3 After an extensive discussion on the applicable law, the  
4 Ninth Circuit affirmed this Court's Order with respect to denying  
5 summary judgment, stating, "[w]e therefore conclude that the  
6 district court properly denied summary judgment on the ground  
7 that plaintiff's claim had not accrued." *Winter v. United*  
8 *States of America*, 244 F.3d 1088, 1092 (9th Cir. 2001).

9 Ultimately, however, the Ninth Circuit reversed and remanded  
10 the matter without providing any significant guidance. There is  
11 no discussion or reference, by the Ninth Circuit, as to the issue  
12 of requesting timely reconsideration<sup>3</sup> - the issue on which this  
13 Court granted summary judgment.

14 With regard to the timeliness of plaintiff's Complaint - the  
15 issue this Court never reached - the Ninth Circuit stated, "[t]he  
16 government argues, in the alternative, that we can affirm summary  
17 judgment on Winter's alleged failure to timely file his  
18 complaint. We will not reach this issue, since it was not  
19 addressed by the district court and it involved the resolution of  
20 *disputed factual issues*." *Winter*, 244 F.3d at 1092. (Emphasis  
21 added).

22 Accordingly, it is unclear to this Court if the matter was  
23 reversed and remanded because of this Court's granting summary  
24 judgment because of plaintiff's failure to properly request  
25 reconsideration from the VA or because of this Court's decision

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27 <sup>3</sup> The only reference made is with regard to the procedural history of the  
28 case. The Ninth Circuit never discusses the merits of plaintiff's proper or  
improper request for reconsideration.

1 not to reach the merits on whether plaintiff timely filed his  
2 Complaint.

3 In any event, defendant again seeks summary judgment.  
4 Essentially, defendant reasserts the argument that plaintiff's  
5 Complaint is barred by the statute of limitations because he  
6 failed to file his lawsuit in District Court within six months of  
7 the VA's final denial of his administrative claim.

8 **DISCUSSION**

9 Summary judgment should be granted pursuant to Federal Rule  
10 of Civil Procedure 56 only if no genuine issues of material fact  
11 exist and the moving party is entitled to judgment as a matter of  
12 law. See *Celotex Corp. v. Catreat*, 477 U.S. 317, 322 (1986). In  
13 ruling upon a motion for summary judgment, the court must view  
14 the evidence in the light most favorable to the nonmoving party.  
15 See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.  
16 574, 587 (1986).

17 In essence, defendant argues summary judgment should be  
18 granted on the basis of the third argument asserted in the  
19 original Motion for Summary Judgment, which was never decided by  
20 this Court. Namely, that plaintiff filed the Complaint more than  
21 six months after the final denial of his claim was mailed.  
22 Plaintiff, on the other hand, argues that the Ninth Circuit has  
23 already determined this involves disputed issues of fact, thus,  
24 this Court is bound by that determination. Alternatively,  
25 plaintiff contends that, assuming the Ninth Circuit's  
26 determination is not applicable, the issue remains in dispute.

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1       **A. Judicial admissions**

2       "Under federal law, stipulations and admissions in the  
3 pleadings are generally binding on the parties and the Court."  
4 *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 225 (9th  
5 Cir. 1988), quoting, *Ferguson v. Neighborhood Housing Services*,  
6 780 F.2d 549, 551 (6<sup>th</sup> Cir. 1986). Judicial admissions are  
7 formal admissions in pleadings, which have the effect of  
8 withdrawing a fact from issue and dispensing with the need for  
9 proof of fact. See *American Title Ins. Co.*, 861 F.2d at 225.

10       In some jurisdictions, factual assertions in pleadings and  
11 pretrial orders are considered judicial admissions conclusively  
12 binding on the party who made them. See *id.* at 226; see also  
13 *White v. Arco/Polymers, Inc.*, 720 F.2d 1391, 1396 (5th Cir.  
14 1983). In the Ninth Circuit, a district court has discretion in  
15 determining whether factual statements made in a brief should be  
16 considered admissions. See *American Title Ins.*, 861 F.2d at 227.  
17 "We...hold that statements of fact contained in a brief may be  
18 considered admissions of the party in the discretion, of the  
19 district court." *Id.* (Emphasis in original).

20       Plaintiff argues statements contained in defendant's  
21 Petition for Rehearing are judicial admissions. In the Petition  
22 for Rehearing, defendant acknowledged twice that "concerns about  
23 timely filing of the complaint...involve disputed factual  
24 issues." Defendant makes no attempt to counter this assertion in  
25 the reply.

26       Against this background, in the exercise of its discretion,  
27 this Court concludes that defendant will not be bound by the  
28 judicial admissions made in the Petition for Rehearing.

1           **B. Law of the Case**

2           The law of the case doctrine requires a district court to  
3 follow the appellate court's resolution of an issue of law in all  
4 subsequent proceedings in the same case. See *United States v.*  
5 *Cote*, 51 F.3d 178, 181 (9th Cir. 1995). The doctrine applies to  
6 the appellate court's "explicit decisions as well as those issues  
7 decided by necessary implication." *Id.*, quoting, *Eichman v.*  
8 *Fotomat Corp.*, 880 F.2d 149, 157 (9th Cir. 1989).

9           The plaintiff seeks to preclude summary judgment based on  
10 the law of the case doctrine set forth above. This is his most  
11 compelling argument for denying summary judgment. While the  
12 Ninth Circuit acknowledged that this Court never reached the  
13 merits of the timeliness of the Complaint, apparently, in  
14 conducting the *de novo* review, the Court was able to evaluate the  
15 parties' arguments in this regard.

16           Ultimately, the Ninth Circuit concluded that the issue need  
17 not be reached since this Court did not reach the issue.  
18 However, in "not reaching the issue," the Ninth Circuit  
19 determined that there were disputed factual issues. "The  
20 government argues, in the alternative, that we can affirm summary  
21 judgment on Winter's alleged failure to timely file his  
22 complaint. We will not reach this issue, since it was not  
23 addressed by the district court and it involves the resolution of  
24 disputed factual issues." *Winter v. United States*, 244 F.3d at  
25 1092.

26           As such, this Court is bound by the findings made by the  
27 Ninth Circuit. Due to the presence of disputed factual issues,  
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1 as determined by the Ninth Circuit, this Court must deny summary  
2 judgment.

3 **C. Defendant's Motion for Summary Judgment**

4 Defendant's legal arguments in favor of summary judgment are  
5 well taken by this Court. However, in the interest of judicial  
6 economy and given the Ninth Circuit's ruling regarding the  
7 presence of disputed factual issues, this Court need not reach  
8 the legal arguments raised by defendant in the Motion for Summary  
9 Judgment<sup>4</sup>.

10 IT IS ORDERED that the defendant's Motion for Summary  
11 Judgment (**Doc. 68**) is **DENIED**.

12 IT IS FURTHER ORDERED that the oral argument set for June 3,  
13 2002 is **VACATED**.

14 IT IS FURTHER ORDERED that the Pretrial Conference set for  
15 August 26, 2002 is **VACATED** and **RESET** set for **Monday, April 29,**  
16 **2002 at 3:00 p.m.**

17 IT IS FURTHER ORDERED that the parties are to file their  
18 Joint Pretrial Statement and all Motions in Limine in accordance  
19 with the original Scheduling Order on or before **April 15, 2002**.

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21 DATED this 7<sup>th</sup> day of March 2002.

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24 Paul G. Rosenblatt  
25 United States District Judge  
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27 <sup>4</sup> The Court recognizes that some additional discovery was undertaken by  
28 defendant in an attempt to resolve the disputed factual issues. Despite  
defendant's attempt, plaintiff persuasively argues that disputed issues of  
material fact remain.